A

FERMPRO SDN BHD v. KETUA PENGARAH JABATAN KASTAM DAN EKSAIS DIRAJA MALAYSIA

COURT OF APPEAL, PUTRAJAYA
RAVINTHRAN PARAMAGURU JCA
HASHIM HAMZAH JCA
B FAIZAH JAMALUDIN JCA
[CIVIL APPEAL NO: W-01(A)-464-09-09-2023]
24 DECEMBER 2024

C **Abstract** – *(i) Section 57(a)(ii) of the Sales Tax Act 2018 ('STA'), read together with s. 2, expressly states that no sales tax shall be levied and payable on taxable goods transported between a free zone and to bonded/special areas in principal customs areas. In this case, the Director General of Customs's action in raising a bill of demand for the recovery* D *of sales tax under s. 28 of the STA is tainted with illegality, since such sales tax cannot be levied and is not payable. It is a fundamental principle of law that taxes or duties cannot be imposed on a subject without clear words in any written law, and taxing statutes must be construed in accordance with this principle; (ii) Applying the purposive approach in interpreting reg. 28(1) of the Free Zones Regulations 1991* E *and s. 57(a)(ii) of the STA , the said provisions provide for a free tax regime for goods transported or moved between free zones and other bonded/special areas in the principal customs area. Any purported error in an import declaration form does not oust the provisions in reg.28 or* F *s. 57(a)(ii) to give rise to duties and/or tax for goods transported between the special areas.*

CUSTOMS & EXCISE: *Duties and taxes – Bills of demand – Imposition of customs duties and taxes due to incorrect declaration in form – Whether sales tax levied and payable on taxable goods transported between free zone and other bonded/* G *special areas in principal customs area – Whether action for recovery of sales tax under s. 28 of Sales Tax Act 2018 ('STA') tainted with illegality – Whether payment of import duties or taxes for removal or transportation of goods from free zone to bonded/special areas in principal customs area required – Whether errors in declaration form ousted provisions in reg. 28 of Free Zones Regulations 1991 or* H *s. 57(a)(ii) of STA to give rise to duties or tax for goods transported between special areas – Free Zones Act 1990, s. 7(1)(b)*

REVENUE LAW: *Duties and taxes – Bills of demand – Imposition of customs duties and taxes due to incorrect declaration in form – Whether sales tax levied and payable on taxable goods transported between free zone and other bonded/special* I *areas in principal customs area – Whether action for recovery of sales tax under*

s. 28 of Sales Tax Act 2018 ('STA') tainted with illegality – Whether payment of import duties or taxes for removal or transportation of goods from free zone to bonded/special areas in principal customs area required – Whether errors in declaration form ousted provisions in reg. 28 of Free Zones Regulations 1991 or s. 57(a)(ii) of STA to give rise to duties or tax for goods transported between special areas – Free Zones Act 1990, s. 7(1)(b)

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Application to quash decision of affirming bills of demand – Imposition of customs duties and taxes due to incorrect declaration in form – Whether sales tax levied and payable on taxable goods transported between free zone and other bonded/special areas in principal customs area – Whether action for recovery of sales tax under s. 28 of Sales Tax Act 2018 ('STA') tainted with illegality – Whether payment of import duties or taxes for removal or transportation of goods from free zone to bonded/special areas in principal customs area required – Whether errors in declaration form ousted provisions in reg. 28 of Free Zones Regulations 1991 or s. 57(a)(ii) of STA to give rise to duties or tax for goods transported between special areas – Free Zones Act 1990, s. 7(1)(b)*

STATUTORY INTERPRETATION: *Construction of statutes – Interpretation – Purposive approach – Free Zones Regulations 1991, reg. 28(1) – Whether require payment of import duties or taxes for removal or transportation of goods from free zone to bonded/special areas in principal customs area – Whether errors in declaration form ousted provisions in reg. 28 and s. 57(a)(ii) of Sales Tax Act 2018 to give rise to duties or tax for goods transported between special areas*

This was an appeal by the appellant, Fermpro Sdn Bhd ('Fermpro'), against the decision of the High Court dismissing its application by way of a judicial review for an order of *certiorari* to quash the decision of the Ketua Pengarah Jabatan Kastam dan Eksais DiRaja Malaysia ('respondent') affirming four bills of demand ('BODs') raised by the respondent against Fermpro. The four BODs were raised by the respondent through the Pengarah Kastam Negeri, Perlis against Fermpro, under s. 17(1) of the Customs Act 1967 ('CA'), s. 15 of the Excise Act 1976 ('EA'), s. 43 of the Goods and Services Tax Act 2014 ('GST Act') and s. 28 of the Sales Tax Act 2018 ('STA'), in respect of the sale of ethanol by Fermpro to Molnlycke Health Care Sdn Bhd ('Molnlycke'). Fermpro made an application to the respondent under s. 143(1) of the CA to review all four BODs. The respondent issued a letter notifying Fermpro of its decision to maintain all four BODs against Fermpro. Dissatisfied, Fermpro filed the application for judicial review at the High Court. Fermpro was carrying on the business of manufacturing ethanol ('a.k.a Denatured Ethyl Alcohol ('DEA')' and was also engaged in importing ethanol from overseas and selling the same to customers in Malaysia. Fermpro had entered into a sale and purchase agreement with Molnlycke for the sale and purchase of ethanol ('SPA') on a 'DDU buyer's premises'

A ('delivery duty unpaid at buyer's premises') basis. For purposes of the SPA with Molnlycke, Fermpro imported ethanol from Sasol Chemicals Pacific Ltd Singapore ('Sasol Chemicals') into Ancom-Chemquest Terminals Sdn Bhd's ('ACTSB') bulk terminal located in a free zone at Westport Free Zone, Port Klang, Selangor. The ethanol was imported into the free zone by a
B declaration in Free Zone Form No 1 Import ('Form ZB1'). In this present case, Form ZB1 showed that Saso Chemicals was named the 'consignor/exporter'; and Fermpro was named the 'consignee/importer'. Pursuant to s. 7(1)(b) of the Free Zones Act 1990 ('FZA'), goods brought out of a free zone and taken into any part of the principal customs area are deemed
C imported in Malaysia. Under the terms of the SPA, Molnlycke is contractually required to remove the ethanol, imported by Fermpro and deposited at the ACTSB terminal at the Westport Free Zone, within five months from the date of delivery of the ethanol into the free zone. In accordance with the terms of the SPA, Molnlycke removed the ethanol from the free zone to Molnlycke's LMW, which was located in the principal
D customs area. Goods were removed from a free zone to a principal customs area through Borang Kastam No 1 ('Form K1'). The information to be filled in the boxes of the Form K1 include 'consignor/exporter' and 'consignee/importer'.The 'K1 Chits' produced during the hearing before the High Court showed that in relation to the ethanol removed from the free zone to
E Molnlycke's LMW, Molnlycke was declared as the 'importer', and Fermpro as the 'exporter'. At the High Court, it was held that (i) Fermpro should have been named as an 'importer' instead of an 'exporter' on Form K1 for the ethanol removed by Molnlycke from the free zone to its LMW because Fermpro was named as an 'importer' in Form ZB1 when it imported the
F ethanol from Singapore into the free zone; (ii) it was an error that Fermpro was declared in Form K1 as an 'exporter' and Molnlycke as an 'importer' and for this reason, it was lawful for the respondent to have raised the customs duties and taxes in the four BODs against Fermpro; (iii) the respondent had imposed the customs duties and taxes on Fermpro because
G of the incorrect declaration in Form K1 of the ethanol sold by Fermpro to Molnlycke and not because of the removal of the ethanol by Molnlycke from the free zone to its LMW. Thus, the High Court dismissed Fermpro's application. Hence, this appeal. The issues that arose were whether the High Court Judge ('HCJ') had erred in fact and in law: (i) by finding that Fermpro
H should have been named as the 'importer' in Form K1 in respect of the ethanol removed from the free zone to Molnlycke's LMW; and (ii) by reason of the purported error in the Form K1, the respondent could oust the free tax status in the reg. 28(1) of the Free Zones Regulations 1991 ('FZA') and s. 57(a) of the STA.

I

Held (allowing appeal)
Per Faizah Jamaludin JCA delivering the judgment of the court:

(1) Pursuant to s. 7(1)(b) of the FZA, goods that are brought out of a free zone and taken into any part of the principal customs area are deemed to be imported into Malaysia. Accordingly, the ethanol removed from the free zone into Molnlycke's LMW was deemed to be imported into Malaysia. It followed therefore, that Molnlycke as the party who was importing the ethanol from the free zone into its LMW in the principal customs area was named as the 'consignee/importer', and Fermpro was named the 'consignor/exporter' in Form K1. Inexplicably, the HCJ, in holding that Fermpro should have been named in the Form K1 as the 'consignee/importer' of the ethanol removed out of the free zone to the LMW, did not address who should be the 'consignor/exporter' of the ethanol in Form K1. For there to be a consignee/importer of goods into the principal customs area, there must be a consignor/exporter of the goods out of the free zone. Just as for every giver, there must be a receiver. (paras 42-45)

(2) If Fermpro must be named as the 'consignee/importer' as held by the HCJ, did it mean that Molnlycke should be named as the 'consignor/exporter' of the ethanol in Form K1? Indeed, this could not be the case since Molnlycke was neither the consignor nor the exporter of the ethanol removed from the free zone. As the purchaser of the ethanol in the SPA, Molnlycke was the consignee of the ethanol purchased and delivered to its LMW. Additionally, following through with the HCJ's reasoning to its conclusion, *ie*, the parties in Form K1 should be the same as the parties in Form ZB1, Sasol Chemical should thus be named as the 'consignor/exporter' of the ethanol from the free zone to Molnlycke's LMW. However, it would be plainly wrong to name Sasol Chemical as the 'consignor/exporter' of the ethanol removed from the free zone in Form K1 since Sasol Chemical was not a party in the SPA for the sale and purchase of the ethanol between Fermpro and Molnlycke, neither was it the consignor or exporter of the ethanol removed from the free zone to the LMW. (paras 46 & 47)

(3) In making his finding that Fermpro should have been named as an importer on Form K1, the HCJ first failed to take into account that in the sale of the ethanol from Fermpro to Molnlycke, there were two stages of the import and export of the ethanol: first stage: the export of the ethanol from Singapore into the free zone at Westport Free Zone; and second stage, the export of the ethanol from the free zone into Molnlycke's LMW in the principal customs area. Secondly, the HCJ failed to consider that under s. 7(1)(b) of the FZA, goods brought out of a free zone and taken into any part of the principal customs area are deemed imported into Malaysia from the free zone. It followed

A therefore, that Molnlycke was the importer of the ethanol into its LMW and not Fermpro. Thirdly, the HCJ failed to consider the terms and conditions of the SPA between Fermpro and Molnlycke. In his judgment, he did not take into account that under the terms of the SPA, Fermpro agreed to sell to and Molnlycke agreed to buy ethanol from
B Fermpro on 'a DDU buyer's premises' basis. (paras 48-50)

(4) Fermpro was contractually obliged under the SPA to pay for all the transportation costs and to bear all the risks until the ethanol removed by Molnlycke from the free zone was delivered to Molnlycke's LMW. It followed therefore, that all the business transactions between the
C transport companies would be between Fermpro and the transport companies and not with the customer, Molnlycke. There would be no reason for there to be records of business transactions between any of the transport companies and Molnlycke. Therefore, there was nothing sinister for the ethanol to have been transported out of the free zone to
D the buyer's premises (*ie*, Molnlycke's LMW) by transport companies paid for by the seller (*ie*, Fermpro). It was in accordance with the terms of the SPA between the parties, where the sale and purchase of the ethanol was on a 'DDU buyer's premises' basis. Accordingly, the HCJ was plainly wrong to hold that Fermpro should have been named as the
E importer on Form K1 because the respondent did not find any records of business transactions between the transport companies and Molnlycke and because Fermpro had paid for the transportation costs of the ethanol removed from the free zone to Molnlycke's LMW. The HCJ was plainly wrong in holding that Fermpro should have been named as the
F importer of the ethanol in Form K1 for the ethanol removed from the free zone into Molnlycke's LMW. Further, the HCJ was plainly wrong in holding that Form K1 was erroneous and the information declared therein, false. (paras 61-64)

(5) Section 28(1) of the STA states that the respondent may recover as a
G civil debt 'any sales tax due and payable'. In this present case, s. 57(a)(ii), read with s. 2 of the STA, expressly states that no sales tax shall be levied and payable on taxable goods transported between a free zone and an LMW. It followed, therefore, as no sales tax was due and payable for the ethanol transported from the free zone to Molnlycke's
H LMW, such non-payable sales tax was not recoverable under s. 28 of the STA. Thus, the respondent's action in raising a BOD for the recovery of sales tax under s. 28 of the STA was tainted with illegality, since such sales tax could not be levied and was not payable pursuant to s. 57(a)(ii) of the STA. Moreover, it is a fundamental principle of law that taxes or duties cannot be imposed on a subject without clear words
I in any written law, and taxing statutes must be construed in accordance with this principle. (paras 76-78)

(6) Applying the purposive approach in interpreting reg. 28(1) of the Free Zones Regulations 1991 ('FZR') and s. 57(a)(ii) of the STA, the said provisions provide for a free tax regime for goods transported or moved between free zones and other bonded/special areas in the principal customs area – they both do not require the payment of import duties or taxes for the removal or transportation of goods from a free zone to an LMW and other bonded/special areas licensed under the CA. More importantly, if Parliament had intended that errors in Form K1 shall give rise to taxes and duties for goods transported from a free zone to an LMW or any other bonded/special areas, it would have expressly provided for it in the relevant Acts or subsidiary legislations. For these reasons, any purported error in Form K1 does not oust the provisions in reg. 28 of the FZA or s. 57(a)(ii) of the STA to give rise to duties and/or tax for goods transported between special areas. It was plainly wrong for the HCJ to have held that taxes and duties were due and payable on the ethanol moved from the free zone to Molnlycke's LMW because of a purported error in Form K1, when no written law expressly states so. (paras 82-85)

Case(s) referred to:

Comptroller-General Of Inland Revenue, Malaysia v. T [1969] CLJU 31; [1969] 1 LNS 31 FC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Mangin v. Inland Revenue Commissioner [1971] AC 739 ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

WT Ramsay Ltd v. Inland Revenue Commission [1982] AC 300 ***(refd)***

Legislation referred to:

Customs Act 1967, ss. 2(1A), 17(1), 143(1), (5)
Excise Act 1976, s. 15
Free Zones Act 1990, ss. 4, 7(1)(b)
Free Zones Regulations 1991, reg. 28(1)
Goods and Services Tax Act 2014 (Repealed), ss. 43, 162(a)
Interpretation Acts 1948 and 1967, s. 17A
Sales Tax Act 2018, ss. 2, 28(1), 57(a)(ii)

For the appellant - Subbramaniam Arjunan; M/s Shanker, Arjunan & Chua
For the respondent - Mohd Faisal Md Noor; SFC & Liyana Muhammad Fuad; FC

[Editor's note: For the High Court judgment, please see Fermpro Sdn Bhd v. Ketua Pengarah Jabatan Kastam Dan Eksais DiRaja Malaysia [2024] CLJU 901 (overruled).]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Faizah Jamaludin JCA:

Introduction

B **[1]** This is an appeal by the appellant, Fermpro Sdn Bhd ("Fermpro"), against the decision of the High Court dismissing its application by way of a judicial review for an order of *certiorari* to quash the decision of the Ketua Pengarah Jabatan Kastam dan Eksais DiRaja Malaysia ("respondent") affirming four bills of demand ("BODs") raised by the respondent against Fermpro.

C **[2]** The four BODs, all dated 15 June 2021, were raised by the respondent through the Pengarah Kastam Negeri, Perlis against Fermpro, under s. 17(1) of the Customs Act 1967 (Act 235) ("CA 1967"), s. 15 of the Excise Act 1976 (Act 176) ("EA 1976"), s. 43 of the Goods and Services Tax Act 2014 (Act 762) ("GST Act 2014") and s. 28 of the Sales Tax Act 2018 (Act 806) D ("STA 2018"), in respect of the sale of ethanol by Fermpro to Molnlycke Health Care Sdn Bhd ("Molnlycke"). The four BODs read:

> *1. Bil Tuntutan dibawah Akta Kastam 1967*
>
> Dimaklumkan bahawa tuan *kurang membayar duti import* bagi tempoh E bercukai dari Januari 2017 hingga Ogos 2019. *Hasil semakan dan auditan yang dilakukan ke atas rekod dan dokumen syarikat tuan mendapati terdapat kesalahan mengikrar Borang Kastam No. 1 (K1).* Dengan ini, mengikut Seksyen 17(1) Akta Kastam 1967, tuan adalah dituntut untuk *membuat bayaran duti import* seperti di Lampiran 1-1, Lampiran 1-2, Lampiran 1-2 & Lampiran 1-4 yang secara keseluruhan berjumlah *RM2,333,770.00.*
>
> F *2. Bil Tuntutan dibawah Akta Eksais 1976*
>
> Dimaklumkan bahawa tuan *kurang membayar duti eksais* bagi tempoh bercukai dari Januari 2017 hingga Ogos 2019. Hasil semakan dan auditan yang dilakukan ke atas rekod dan dokumen syarikat tuan mendapati terdapat kesalahan mengikrar Borang Kastam No. 1 (K1). Dengan ini, G mengikut *Seksyen 15 Akta Eksais 1976*, tuan adalah dituntut untuk membuat bayaran duti import seperti di Lampiran 1-1, Lampiran 1-2, Lampiran 1-2 & Lampiran 1-4 yang secara keseluruhan berjumlah *RM4,460,377.67.*
>
> *3. Bil Tuntutan dibawah Akta Cukai Barang dan Perkhidmatan 2014*
>
> H Dimaklumkan bahawa tuan *kurang membayar cukai barang dan perkhidmatan* bagi tempoh bercukai dari Januari 2017 hingga Ogos 2019. Hasil semakan dan auditan yang dilakukan ke atas rekod dan dokumen syarikat tuan mendapati terdapat kesalahan mengikrar Borang Kastam No. 1 (K1). Dengan ini, mengikut Seksyen 43 Akta Cukai Barang dan Perkhidmatan 2014, tuan adalah dituntut untuk membuat bayaran duti import seperti di I Lampiran 1-1, Lampiran 1-2, Lampiran 1-2 & Lampiran 1-4 yang secara keseluruhan berjumlah *RM167,417.63.*

4. Bil Tuntutan dibawah Akta Cukai Jualan 2018

Dimaklumkan bahawa tuan *kurang membayar cukai jualan* bagi tempoh bercukai dari Januari 2017 hingga Ogos 2019. Hasil semakan dan auditan yang dilakukan ke atas rekod dan dokumen syarikat tuan mendapati terdapat kesalahan mengikrar Borang Kastam No. 1 (K1). Dengan ini, mengikut *Seksyen 28 Akta Cukai Jualan 2018*, tuan adalah dituntut untuk membuat bayaran duti import seperti di Lampiran 1- 1, Lampiran 1-2, Lampiran 1-2 & Lampiran 1-4 yang secara keseluruhan berjumlah *RM822,684.42.*

(emphasis added)

[3] Fermpro made an application to the respondent on 8 September 2020, under s. 143(1) of the CA 1967, to review all four BODs.

[4] The respondent, on 3 August 2021, issued a letter dated 29 July 2021, notifying Fermpro of its decision to maintain all four BODs against Fermpro.

[5] Dissatisfied with the respondent's decision of the review, Fermpro filed the application for judicial review at the High Court on 14 October 2021.

Salient Facts And The Applicable Laws

[6] Fermpro carries on the business of manufacturing ethanol (a.k.a. Denatured Ethyl Alcohol ("DEA")). It also engages in importing ethanol from overseas and selling the same to customers in Malaysia. Molnlycke is one of its customers.

[7] The subject matter of the impugned BODs, issued by the respondent against Fermpro, relates to the Fermpro's sale of ethanol to Molnlycke.

[8] Fermpro had entered into a sale and purchase agreement dated 14 November 2014 with Molnlycke for the sale and purchase of ethanol ("SPA") on a "DDU buyer's premises" (delivery duty unpaid at buyer's premises) basis.

[9] For purposes of the SPA with Molnlycke, Fermpro imported ethanol from Sasol Chemicals Pacific Ltd, Singapore ("Sasol Chemicals") into Ancom-Chemquest Terminals Sdn Bhd's ("ACTSB") bulk terminal located in a free zone at Westport Free Zone, Port Klang, Selangor.

[10] The ethanol was imported into the free zone by a declaration in Free Zone Form No. 1 Import ("Form ZB1"). In this present case, Form ZB1 in exh. RLSC-6 shows that Sasol Chemicals was named the "consignor/exporter", and Fermpro was named the "consignee/importer". The declaration in Form ZB1 was made on Fermpro's behalf by Tuck Sun & Co (Malaysia) Sdn Bhd ("TSC") – a delivery agent authorised by the respondent.

What Is A Free Zone?

[11] A free zone is defined in the Free Zones Act 1990 (Act 438) ("FZA 1990") as:

> any part of Malaysia declared under the provisions of subsection 3(1) to be a free commercial zone or a free industrial zone.

[12] Under s. 2(1A) of the CA 1967, a free zone is deemed to be a place outside Malaysia. Section 2(1A) reads:

> (1A) For the purposes of this Act (other than s. 31), **a free zone is deemed to be a place outside Malaysia**.
>
> (emphasis added)

[13] With effect from 9 July 2019, s. 2(1A) of the CA 1967 was amended by the Customs (Amendment) Act 2019 (Act A1593), where a free zone was deemed to be a place outside a principal customs area:

> (1A) For the purposes of this Act, **a free zone shall be deemed to a place outside a principal customs area**, and the provisions of s. 31 and Parts IV, V, VI and VII of this Act shall apply to a free zone.
>
> (1B) For the purposes of subsection (1A):
>
> (a) "free zone" means any area in Malaysia which has been declared by the Minister to be a free commercial zone or a free industrial zone under the Free Zone Act, 1990 (Act 438); and
>
> (b) "principal customs area" means any part of Malaysia excluding free zone, Labuan, Langkawi, Tioman and Pangkor.
>
> (emphasis added)

[14] Pursuant to s. 7(1)(b) of the FZA 1990, goods brought out of a free zone and taken into any part of the principal customs area are deemed imported into Malaysia. Section 7(1)(b) reads:

> (b) goods which are brought out of a free zone and taken into any part of the principal customs area shall be deemed to be imported into Malaysia.

[15] Accordingly, notwithstanding the amendment to s. 2(1A) of the CA 1967, the situation after 9 July 2019 remains the same as regards goods brought out of the free zone. Pursuant to s. 7(1)(b) of the FZA 1990, goods brought out of the free zone into any part of the principal customs area are deemed an import into Malaysia.

[16] Under the terms of the SPA, Molnlycke is contractually required to remove the ethanol, imported by Fermpro and deposited at the ACTSB terminal at the Westport Free Zone, within five months from the date of delivery of the ethanol into the free zone. In accordance with the terms of the SPA, Molnlycke removed the ethanol from the free zone to Molnlycke's licensed manufacturing warehouse ("LMW"), which located in the principal customs area.

[17] Goods are removed from a free zone to a principal customs area through Borang Kastam No. 1 ("Form K1"). The information to be filled in the boxes of the Form K1 includes "consignor/exporter" and "consignee/importer".

[18] The "K1 Chits" produced during the hearing before the High Court showed that in relation to the ethanol removed from the free zone to Molnlycke's LMW, Molnlycke was declared as the "importer", and Fermpro as the "exporter".

Judgment Of The High Court Judge

[19] The learned High Court Judge held that Fermpro should have been named as an "importer" instead of an "exporter" on Form K1 for the ethanol removed by Molnlycke from the free zone to its LMW. He said this was because Fermpro was named as an "importer" in Form ZB1 when it imported the ethanol from Singapore into the free zone.

[20] His Lordship found that it was an error that Fermpro was declared in Form K1 as an "exporter" and Molnlycke as an "importer". He held that for this reason, it was lawful for the respondent to have raised the customs duties and taxes in the four BODs against Fermpro.

[21] The learned High Court Judge further held that the respondent had imposed the customs duties and taxes on Fermpro because of the incorrect declaration in Form K1 of the ethanol sold by Fermpro to Molnlycke and not because of the removal of the ethanol by Molnlycke (referred to in the judgment as "DEA") from the free zone to its LMW. The learned judge stated in para. [27] of his grounds of judgment:

> [27] ... There is no evidence that the Director General imposed customs duties or tax for the transportation of the DEA from the free zone to an LMW. The customs duties and tax were imposed on the basis of the incorrect declaration made in Customs Form K1 where the DEA was sold to Molnlycke.

[22] By reason of his findings that (i) the declaration of Fermpro as "exporter" and Molnlycke as "importer" on Form K1 was erroneous, and (ii) the respondent had imposed the duties and taxes on Fermpro because of the error in Form K1, the learned judge dismissed Fermpro's application.

Fermpro's Submission

[23] Counsel for Fermpro submitted that the learned High Court Judge had erred in fact and in law on two counts, namely:

(i) when he made the finding that there was an error in Form K1, where Fermpro was named as "exporter" and Molnlycke was named as "importer", and that Fermpro should have been named in Form K1 as "importer" instead; and

(ii) even if there was an error in Form K1, there is no provision in reg. 28(1) of the Free Zones Regulations 1991 and s. 57(a) of the STA 2018 to oust the free tax status of goods moved or transported from free zones to LMWs.

Respondent's Submission

[24] At the substantive hearing of the judicial review before the High Court, learned Federal Counsel ("FC"), raised a preliminary issue that Fermpro did not exhaust the statutory appeal procedure in s. 143(5) of the CA 1967 as it did not appeal the respondent's decision to the Customs Appeal Tribunal under s. 143(5) before filing its application for judicial review.

[25] The learned High Court Judge did not dismiss Fermpro's application by reason of the preliminary issue. Also, he did not address the preliminary issue in his written grounds of judgment of 14 April 2024. His judgment dealt only with the merits of the application.

[26] At the hearing of this appeal, learned Senior Federal Counsel ("SFC") repeated the preliminary issue, raised by the FC at the substantive hearing, before submitting on the merits of the appeal.

[27] As regards the learned judge's decision and written judgment, learned SFC submitted that the learned judge was not plainly wrong in deciding that the declaration of Fermpro as "exporter" in Form K1 was erroneous and that the respondent's decision, to issue the BODs and to affirm the BODs because of the error, were not tainted with illegality, irrationality, or procedural impropriety.

The Preliminary Issue

[28] The "preliminary issue" was raised by learned FC for the first time at the substantive hearing of the judicial review at the High Court. She did not raise it at the leave stage of Fermpro's application.

[29] The leave hearing of Fermpro's application for judicial review was held on an opposed *ex parte* basis on 6 December 2021 at the High Court. The same learned FC, who represented the respondent at the substantive hearing, had represented the Attorney General at the hearing of the leave application. The records show that at the hearing of the leave application, learned FC did not raise the "preliminary issue". Instead, she informed the court that she did not object Fermpro's leave application for judicial review; she only objected Fermpro's application for a stay of execution of the BODs pending disposal of the judicial review by the High Court.

[30] After hearing the submission from Fermpro's counsel and the non-objection by learned FC, the High Court allowed Fermpro's leave application for judicial review on 6 December 2021. The learned judge

directed the stay application be fixed for hearing on an *inter partes* basis. The *inter partes* hearing of the stay application was heard on 15 June 2022, where the High Court granted Fermpro's application for stay pending disposal of the substantive hearing of the judicial review.

[31] Although the learned High Court Judge did not touch upon the "preliminary issue" in his judgment, learned SFC repeated the "preliminary issue" at the hearing of this appeal.

[32] With respect to learned SFC, this "preliminary issue" should have been raised by the FC at the hearing of the leave application. However, instead of opposing the leave application and raising the "preliminary issue", learned FC informed the High Court that she had no objection to Fermpro's application for leave.

[33] Perhaps this was a reason why the learned High Court Judge did not address the "preliminary issue" in his judgment delivered at the conclusion of the substantive hearing of the judicial review.

[34] In the circumstances, we too shall not deal with the "preliminary issue" in this appeal.

Issues For Determination

[35] The issues for this court's determination arising out of the High Court's judgment in this case are whether the learned High Court Judge had erred in fact and in law: (a) by finding that Fermpro should have been named as the "importer" in Form K1 in respect the ethanol removed from the free zone to Molnlycke's LMW; and (b) by reason of the purported error in the Form K1, the respondent can oust the free tax status in the reg. 28(1) of the Free Zones Regulations 1991 and s. 57(a) of the STA 2018.

Principles Of Appellate Intervention

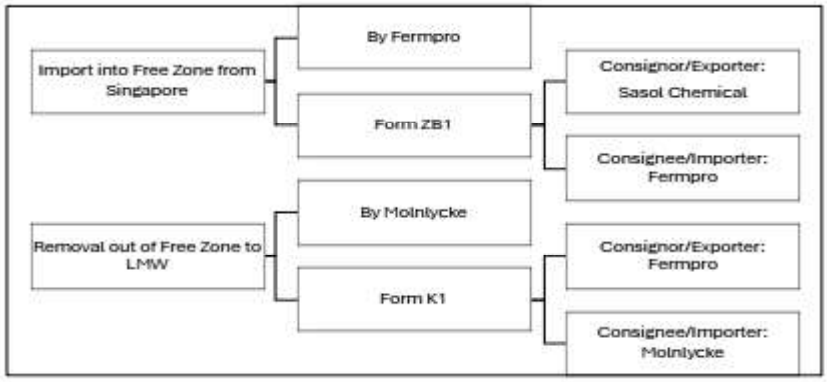
[36] The law is settled that an appellate court ought not to intervene with the trial court's conclusion on primary facts unless it is satisfied that the trial judge was plainly wrong. Based on this "plainly wrong test", an appellate court is entitled to examine the process of evaluation of evidence by the trial court and may set aside any decision of the trial court with no or insufficient judicial appreciation of the evidence or based on errors of law: see the Federal Court decisions in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1; [2004] 6 AMR 781; *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785; [2010] MLJU 2179; [2011] 1 AMCR 338; *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441; [2015] 2 AMR 601; *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] 12 MLJ 67.

[37] Therefore, in deciding whether this court should intervene in the decision made by the learned High Court Judge in dismissing Fermpro's application in the judicial review, this court has to ascertain whether the learned judge was plainly wrong based on the facts and the applicable law in this case.

Issue 1: Was There An Error On Form K1? Should Fermpro Be Named As "Importer" In Form K1 For The Ethanol Removed From The Free Zone To The LMW?

[38] With regards to the ethanol sold by Fermpro to Molnlycke, the documents exhibited during the judicial review hearing at the High Court show the ethanol imported by Fermpro from Sasol Chemicals, Singapore was deposited *via* pipeline at the ACTSB at the Westport Free Zone, Port Klang as per Form ZB1 dated 30 September 2018. The ethanol was removed by Molnlycke from the free zone to its LMW per Form K1 dated 29 October 2018.

[39] Based on the terms of the SPA, there are two stages in the movement of the ethanol sold by Fermpro to Molnlycke under the SPA: (i) the importation of ethanol from Singapore by Fermpro into the free zone; and (ii) the removal of the ethanol by Molnlycke from the free zone to its LMW located in the principal customs area. See diagram below:



[40] Fermpro had imported the ethanol from Singapore into the free zone. The information required to be filled in Form ZB1 for importation of goods into a free zone are, among others, "consignor/exporter" and "consignee/importer". The consignor and exporter of the ethanol was Sasol Chemical, and the consignee and importer of the ethanol of the ethanol into the free zone was Fermpro. Accordingly, Sasol Chemical was named "consignor/exporter" and Fermpro was named as "consignee/importer" in Form ZB1.

[41] Pursuant to the SPA between Fermpro and Molnlycke, Molnlycke had, through transport agents authorised by the respondent, removed the ethanol out of the free zone into its LMW within the period stipulated in the SPA.

[42] As discussed above, pursuant to s. 7(1)(b) of the FZA 1990, goods that are brought out of a free zone and taken into any part of the principal customs area are deemed to be imported into Malaysia. Accordingly, the ethanol removed from the free zone into Molnlycke's LMW was deemed to be imported into Malaysia.

[43] It follows therefore, that Molnlycke as the party who was importing the ethanol from the free zone into its LMW in the principal customs area was named as the "consignor/exporter" in Form K1, and that Fermpro was named the "consignor/exporter" in Form K1.

[44] However, the learned High Court Judge found that because Fermpro was named as the "consignor/exporter" in Form ZB1, it should also be named as "consignor/exporter" in Form K1. He held that not only was the Fermpro being declared as the "consignor/exporter" of the ethanol moved out of the free zone in the Form K1 erroneous but also false. His Lordship in his grounds of judgment said:

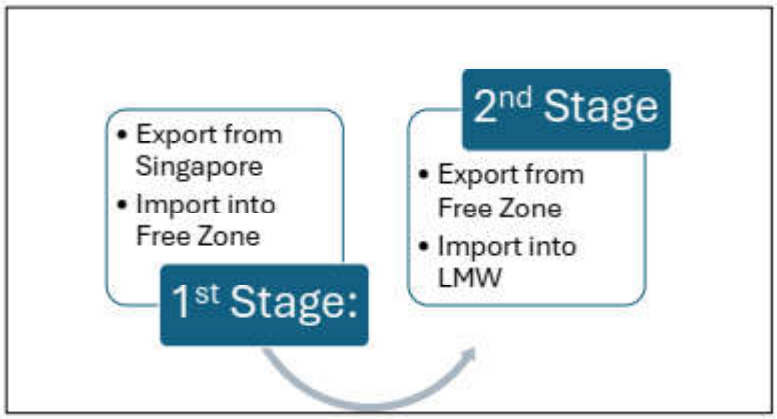
> [24] ... "In other words, *the declaration in Form K1 as Molnlycke being the importer and the applicant being the exporter was not correct or false*. Thus, the Director General did not commit any error of law the kind of which would warrant interference by way of judicial review ...
>
> [25] The applicant's case was fallacious. It depended heavily on Form K1, where the applicant was described as exporter and Molnlycke, its LMW customer, was described as the importer. *The description of the applicant and Molnlycke was clearly wrong and gave rise to customs duties implications as found by the Director General. The description was against the evidence in Form ZB1 which declared the applicant as an importer*. ... The applicant's whole case hinges on the Form K1 wherein the declaration of the description of the parties was not true.
>
> ...
>
> [41] There is no new reason. The reason held all along was that Form K1 was not correct. *The importer in Form K1 ought to be the applicant and not the exporter of the DEA that was deposited at the free zone based on undisputed evidence in the affidavits and submissions. Molnlycke was the purchaser of the DEA and not the importer*. The undisputed evidence showed that Molnlycke was the customer of the applicant and holder of an LMW licence to whom the DEA was sold. The word false with respect to Form K1 is not a new reason. The word false depicts the incorrect declaration made in Form K1.
>
> (emphasis added)

[45] Inexplicably, the learned High Court Judge, in holding that Fermpro should have been named in the Form K1 as the "consignor/exporter" of the ethanol removed out of the free zone to the LMW, did not address who should be the "consignor/exporter" of the ethanol in Form K1. For there to be a consignee/importer of goods into the principal customs area, there must be a consignor/exporter of the goods out of the free zone. Just as for every giver, there must be a receiver.

[46] If Fermpro must be named as the "consignor/exporter" as held by the learned High Court Judge, does it mean that Molnlycke should be named as the "consignor/exporter" of the ethanol in Form K1? Indeed, this cannot be the case since Molnlycke is neither the consignor nor the exporter of the ethanol removed from the free zone. As the purchaser of the ethanol in the SPA, Molnlycke is the consignee of the ethanol purchased and delivered to its LMW.

[47] Additionally, following through with the learned High Court Judge's reasoning to its conclusion, *ie*, the parties in Form K1 should be the same as the parties in Form ZB1, Sasol Chemical should thus be named as the "consignor/exporter" of the ethanol from the free zone to Molnlycke's LMW. However, it would be plainly wrong to name Sasol Chemical as the "consignor/exporter" of the ethanol removed from the free zone in Form K1 since Sasol Chemical was not a party in the SPA for the sale and purchase of the ethanol between Fermpro and Molnlycke, neither was it the consignor or exporter of the ethanol removed from the free zone to the LMW.

[48] We find that in making his finding that Fermpro should have been named as an importer on Form K1, the learned judge, first, failed to take into account that in the sale of the ethanol from Fermpro to Molnlycke there were two stages of the import and export of the ethanol: first stage: the export of the ethanol from Singapore into the free zone at Westport Free Zone; and second stage, the export of the ethanol from the free zone into Molnlycke's LMW in the principal customs area. Both stages of the export and import are shown in the diagram below:



[49] Secondly, the learned judge failed to consider that under s. 7(1)(b) of the FZA1990, goods brought out of a free zone and taken into any part of the principal customs area are deemed imported into Malaysia from the free zone. It follows therefore, that Molnlycke was the importer of the ethanol into its LMW and not Fermpro.

[50] Thirdly, we find that the learned judge failed to consider the terms and conditions of the SPA between Fermpro and Molnlycke. In his judgment, he did not address the fact that the sale and purchase of the ethanol was on a "DDU buyer's premise" basis. He did not take into account that under the terms of the SPA, Fermpro agreed to sell to and Molnlycke agreed to buy ethanol from Fermpro on "a DDU buyer's premises" basis.

[51] The learned High Court Judge repeated in his judgment the respondent's audit findings that the ethanol was declared in Form K1 by transport companies TSC or Mobisco Sdn Bhd, ("MSB") and that the ethanol was delivered to Molnlycke's LMW by transport companies Chan Soon Transport & Trading Sdn Bhd ("CSTTSB") or Cogent Transport Company Sdn Bhd ("CST") – which transportation costs were paid by Fermpro.

[52] TSC or MSB paid the import GST payable on the declaration in Form K1 for the importation of the goods into the LMW from the free zone, for which they subsequently claimed reimbursement from Fermpro. Fermpro reimbursed both TSC and MSB for the import GST paid and claimed the import GST as Fermpro's tax input since Fermpro was responsible under the SPA for the transportation costs of the ethanol right up to delivery of the ethanol to Molnlycke's LMW.

[53] The recital and salient terms of the SPA are as follows. Fermpro is referred to as "Seller" and Molnlycke as "Buyer" in the SPA.

> WHEREAS:
>
> (a) *Seller is a major ethanol supplier engaged in the importation, storage, transportation, and sale of ethanol and wishes to sell ethanol to Buyer on the terms and conditions set forth in this Agreement*; and
>
> (b) *Buyer is consumer of ethanol and wishes to buy ethanol from Seller on the terms and conditions set forth in this Agreement*.
>
> NOW THEREFORE in consideration of the foregoing premises and mutual covenant and agreements hereinafter set forth Seller and Buyer hereby agree as follows:
>
> 1. QUANTITY
>
> Buyer warrants to Seller that shall purchase from Seller at least 1,000 metric tons (mt) of ethanol for each year during the terms of this Agreement. Such quantity shall be spread out evenly throughout each year on the basis of at least 500mt for every 5-month period. *Buyer agrees to purchase the ethanol from Seller on a DDU Buyer's Premises basis* and subject to a quantity of not less than 90mt in any month. *DDU shall be as defined in INCOTERMS 2000 and amendment or modification thereof.*

Relying on Buyer's warranty as stated above, *Seller shall import by ship a parcel of about 500mt of ethanol (hereinafter referred to as "Said Parcel"), duty unpaid,* at least once every five months (or more frequently as required by Buyer) and *shall upon ship's arrival, discharge and store such Said Parcel in a bonded tank at Seller's leased storage facilities in Ancom-Chemquest Terminals, Port Klang (hereinafter referred to as "Seller's Premises").* Thereafter, subject to Buyer fulfilling its obligations as stated in Clause 3, *Seller shall proceed to deliver such Said Parcel to Buyer's Premises using bulk road tanker.*

Buyer agrees that it shall take delivery of the entire quantity of such Said Parcel within 5 months of the date of arrival and discharge of such said Parcel into Seller's Premises. In the event that Buyer fails to do so, Seller shall have the right, at the expiry of the 5-month period, to dispose off any balance quantity of such Said Parcel in any manner Seller sees fit and Buyer shall be liable to Seller for any and all costs, charges, expenses (including any duties and taxes) incurred by Seller and any and all losses and damages suffered by Seller arising out of or in connection with such disposal.

...

3. Import Licenses, Duties, Taxes And Other Charges

Buyer shall be responsible in obtaining any and all licenses or permits and paying any duties, taxes, fees charges or similar assessments that may be required by the government or any agency thereof in connection with the importations and or purchase of the ethanol from the Seller

(emphasis added)

[54] Clause 1 of the SPA expressly states that the sale of the ethanol from Fermpro to Molnlycke is on a "DDU Buyer's Premises" basis and that "DDU shall be defined in INCOTERMS 2000 and any amendment or modification thereof."

What Are INCOTERMS 2000?

[55] INCOTERMS 2000 is a set of international rules, published by the International Chamber of Commerce (ICC) effective 1 January 2000, for the interpretation of the most commonly used trade terms. It divides transaction costs and responsibilities between buyer and seller, and closely corresponds to the UN Convention of Contracts for the International Sale of Goods ("CISG"). The editors of *"Goode on Commercial Law"*, 5th Edition - Professor Roy Goode's classic text on commercial law – said the following with regards to INCOTERMS:

32.09 The primary source of the rights and duties of the parties to a contact of sale is, of course, the contract itself. This encompasses not only the express terms spelled out in the contract document but usages of trade and any codification of trade terms incorporated into the contract and thereby adopted by the parties as their contractual dictionary. The most widely adopted of these as Incoterms, published by the International Chamber of Commerce.

[56] "DDU" is defined in the INCOTERMS 2000 as: A

> Delivered Duty Unpaid (DDU)
>
> It means that the seller pays for all transportation costs and bears all risk until the goods have been delivered, but does not pay for the duty.

[57] In the SPA between Fermpro and Molnlycke, the sale and purchase B of the ethanol is on a "DDU buyer's premises" basis. It means that the ethanol is to be delivered to the buyer's premises (*ie*, Molnlycke's LMW) and Fermpro is responsible for all the transportation costs and bears all the risk of the ethanol until it is delivered to Molnlycke's LMW but Fermpro is not responsible for paying any duties, if required, on the ethanol C purchased. The responsibility to pay any duties and taxes on the ethanol is Molnlycke's: cl. 3 of the SPA states that Molnlycke is responsible for paying any duties or taxes in connection with the importation and/or purchase of the ethanol from Fermpro.

[58] Relying on Molnlycke's warranty that it will purchase 1,000mt of D ethanol from Fermpro annually, the latter agreed to import that 500mt of ethanol every five months and to deposit the same in ACTSB's terminal in the Westport Free Zone.

[59] Molnlycke is contractually obliged under the SPA to take delivery and remove the entire quantity of ethanol from the free zone to its LMW within E five months from the date the ethanol was deposited in the free zone. If Molnlycke fails to take delivery and remove the ethanol within five-month period, Fermpro has the right, under cl. 1 of the SPA, to dispose of any balance quantity of ethanol stored in the free zone and Molnlycke shall be liable to Fermpro for all costs, charges and expenses (including duties and F taxes) incurred by Fermpro and all losses and damages suffered by Fermpro in connection with the disposal.

[60] In his judgment, the learned High Court Judge held that Fermpro was the importer and owner of the ethanol by reason of the respondent's audit findings that there were no records of business transactions between the G transport companies (TSC, MSB, CSTTSB and CST) with Molnlycke, and because of these business transactions and Fermpro's payments to these transport companies. Based on these findings, the learned judge held that the respondent's decision in his letter of 19 August 2019 was not tainted with illegality, or irrationality, or procedural impropriety. He said: H

> [22] The audit also made inspections at TSC, MSB, CSTTSB, and PCSB and found no records of business transactions between these companies and Molnlycke. All the business transactions and payments received by these companies were from the applicants.
>
> [23] In the circumstances, the Director General did not commit any errors I of law as alleged by the applicant. The applicant was the importer and owner of the DEA and not Molnlycke. Molnlycke was the purchaser of

A the DEA and purchased the same from the applicant [Fermpro]. Thus, I found no illegality or irrationality, or procedural impropriety in making the following decision in the Director General's letter dated 19 August 2019:

> Fermpro Sdn Bhd tidak layak menuntut pengecualian duti import, duti eksais import, cukai barang dan perkhidmatan (CBP) impoty dan cukai jualan (CJ)(import) bagi denatured ethyl alcohol/ethanol yang di bawa keluar dari Ancom-Chemquest Terminals Sdn Bhd (ACTSB). Ini adalah disebabkan barang yang dikeluarkan dan diikrar atas nama Molnlycke Health Care Sdn Bhd dalam Borang Kastam No. 1 (which is Form K1) adalah sepatutnya milikan Fermpro Sdn Bhd setelah menelity semua dokumen-dokumen berkaitan.

[61] With respect to the learned judge, Fermpro is contractually obliged under the SPA to pay for all the transportation costs and to bear all the risk until the ethanol removed by Molnlycke from the free zone is delivered to Molnlycke's LMW. It follows therefore, that all the business transactions between the transport companies would be between Fermpro and the transport companies and not with the customer, Molnlycke. There would be no reason for there to be records of business transactions between any of the transport companies and Molnlycke. Just like where a person buys goods from a seller, *eg*, directly from the seller, or on shopping platforms such as Shopee or Amazon, the seller bears the delivery costs; thus, the business transaction to deliver the goods purchased would be between the seller and the delivery companies, *eg*, DHL, Gedex or Lalamove. It would not be between the buyer and the delivery companies. It follows, therefore, there would be no records of business transactions between the buyer and the delivery companies.

[62] Therefore, we find nothing sinister for the ethanol to have been transported out of the free zone to the buyer's premises (*ie*, Molnlycke's LMW) by transport companies paid for by the seller (*ie*, Fermpro). It was in accordance with the terms of SPA between the parties, where the sale and purchase of the ethanol was on a "DDU buyer's premises" basis.

[63] Accordingly, we find that the learned judge was plainly wrong to hold that Fermpro should have been named as the importer on Form K1 because the respondent did not find any records of business transactions between the transport companies and Molnlycke and because Fermpro had paid for the transportation costs of the ethanol removed from the free zone to Molnlycke's LMW.

[64] Accordingly, for the reasons above, we find that the learned High Court Judge was plainly wrong in holding that Fermpro should have been named as the importer of the ethanol in Form K1 for the ethanol removed from the free zone into Molnlycke's LMW. We further find that the learned judge was plainly wrong in holding that Form K1 was erroneous and the information declared therein, false.

Issue 2: By Reason Of The Purported "Error" In Form K1, Can The Free Tax Status In The Regulation 28(1) Of The Free Zones Regulations 1991 And Section 57(a) Of The STA 2018 Be Ousted?

[65] Under s. 4 of the FZA 1990, any goods, except those prohibited by law, may be brought into a free zone free of customs or excise duties. Section 4 of the FZA 1990 reads:

> 4. Goods in a free zone
>
> Subject to this Act goods of any description, except those specifically and absolutely prohibited by law, may be brought into, produced or manufactured in a free zone without payment of any customs duty or excise duty.

[66] Section 162(a) of the GST Act 2014 provides:

> (a) no tax is due and payable for goods imported into a free zone, except for goods imported to be used or consumed in the free zone, other than goods for the purpose of commercial or retail trade activities approved under the Free Zones Act 1990;

[67] Section 57(a) of the STA 2018 allows for the free movement of goods between special areas, which includes free zones and LMWs. It stipulates that no sales tax shall be levied and payable on any taxable goods imported into or transported to or from these special areas. Sections 2 and 57(a) of the STA 2018 read:

> – **Section 2: Interpretation**
>
> "special areas" means any free zone, licensed warehouse and licensed manufacturing warehouse, and the Joint Development Area;
>
> – **Section 57: Sales tax relating to taxable goods imported into or transported to or from special areas**
>
> **Notwithstanding anything to the contrary contained in this Act:**
>
> (a) **no sales tax shall be levied and payable on any taxable goods**:
>
> (i) imported into the special areas or transported to the special areas from Malaysia;
>
> (ii) **transported between the special areas**; or
>
> (iii) transported from the special areas to the designated areas,
>
> other than any taxable goods which the Minister may from time to time declare by order published in the *Gazette*;
>
> (emphasis added)

[68] In this present case, the learned High Court Judge held that based on his findings that the declarations in Form K1 were erroneous, the respondent's decision to affirm the BODs for the duties and taxes raised

against Fermpro under the CA 1967, the EA 1976, the GST Act 2014 and the STA 2018 was not illegal, irrational or tainted with procedural impropriety. He held:

> [24] Therefore, the import duty, excise duty, GST, and sales tax from September 2016 to August 2019 was lawfully raised under s. 17 of the Customs Act, s. 15 of the Excise Act, s. 46 of the GST, and s. 28 of the Sales Tax Act respectively.

[69] Learned counsel for Fermpro disagrees. He said that even if there was an error in Form K1, the respondent does not have the power to oust the free tax status statutorily accorded to goods removed from the free zone to an LMW under reg. 28(1) of the Free Zones Regulations 1991 and s. 57(a) of the STA 2018.

[70] The removal of goods from a free zone to an LMW is governed by reg. 28 of the Free Zones Regulations 1991. For the period in question for which the BODs were issued (*ie*, January 2017 to August 2019), reg. 28 of the Free Zones Regulations 1991 reads:

> **28. Removal of goods from licensed warehouse *etc*, to free zones and *vice versa***
>
> (1) A person or his agent who removes goods:
>
> (a) from:
>
> (i) a licensed warehouse;
>
> (ii) a licensed manufacturing warehouse; or
>
> (iii) a licensed inland clearance depot,
>
> licensed under the Customs Act 1967 to a free zone through a principal custom area;
>
> (b) **from a free zone:**
>
> (i) to a duty free shop;
>
> (ii) to a licensed warehouse;
>
> (iii) **to a licensed manufacturing warehouse**; or
>
> (iv) to a licensed inland clearance depot,
>
> licensed under the Customs Act 1967 through a principal customs area;
>
> (c) from a free zone to another free zone through a principal customs area; or
>
> (d) from any place of import to any free zone through a principal customs area,
>
> shall, personally or through his agent, submit a declaration as in Form Customs No. 8 as specified in the Second Schedule of the Customs Regulations 1977 to a proper officer of customs at the free zone or at the customs office designated for that purpose.

(2) A copy of the declaration submitted pursuant to this regulation shall be transmitted to the Authority in charge of the free zone by the proper officer of customs.

(emphasis added)

[71] By reason of the purported error in Form K1, the respondent had raised, for the period of January 2017 to August 2019, the BODs for customs duties and taxes against Fermpro.

[72] The learned High Court Judge held that the respondent's action in imposing the customs duties and taxes for the removal of the ethanol from the free zone to Molnlycke's LMW was not illegal because, in his view, reg. 28(1) of the Free Zones Regulations 1991 does not apply to the facts of the case. He held:

[27] Regulations 28(1) of the Free Zones Regulations does not apply to the facts of the instant case. There is no evidence that the Director General imposed customs duties or tax for the transportation of the DEA from the free zone to an LMW. The customs duties and tax were imposed on the basis of the incorrect declaration made in Customs Form K1 where the Dea was sold to Molnlycke.

[28] The reliance of regulation 28(1) of the Free Zones Regulations is clearly misplaced.

[73] While the learned judge accepted that no sales tax was payable on any goods moved between a free zone and an LMW under s. 57(a)(ii) of the STA 2018, he went on to hold that the sales tax imposed by the respondent for the removal of the ethanol from the free zone to Molnlycke's LMW was to recover sales tax under s. 28 of the STA 2018 and had "nothing to do" with s. 57(a)(ii) of the STA 2018. He said:

[30] For the purposes of the Sales Tax Act "special area", *inter alia*, means any free zone, any licensed warehouse (LW), and any licensed manufacturing warehouse (LMW). So clearly, no sales tax shall be levied and payable on any taxable goods transported between a free zone and an LMW.

[32] In view of the clear and unambiguous words of s. 28 of the Sales Tax Act, the sales tax imposed in the bill of demand has nothing to do with s. 57(a)(ii) of the Sales Tax Act. This submission is devoid of merit.

[74] Section 28 of the STA 2018 governs the recovery of sales tax as a civil debt. It states:

28. Recovery of sales tax, *etc*, as civil debt

(1) Without prejudice to any other remedy and notwithstanding any review or appeal against any decision of the Director General under s. 96, *any sales tax due and payable, any surcharge accruing, or any penalty, fee or other money payable, under this Act, may be recovered as a civil debt due to the Government*.

A (2) *Where an invoice shows a sale of taxable goods as having taken place with sales tax chargeable on the goods*, there shall be recoverable from the person who issued the invoice an amount equals to:

(a) that which is shown in the invoice as sales tax; or

B (b) so much of the total amount shown as payable as is to be taken as representing sales tax, if the sales tax is not separately shown in the invoice,

for the sale of such taxable goods.

(emphasis added)

C **[75]** Respectfully, we disagree with the learned High Court Judge's view that the recovery of sales tax by the respondent under s. 28 of the STA 2018 has "nothing to do" with s. 57(a)(ii) of the STA 2018.

[76] Section 28(1) of the STA 2018 states that the respondent may recover as a civil debt "any sales tax due and payable". In this present case, D s. 57(a)(ii), read with s. 2 of the STA 2018, expressly states that no sales tax shall be levied and payable on taxable goods transported between a free zone and an LMW. It follows, therefore, as no sales tax is due and payable for the ethanol transported from the free zone to Molnlycke's LMW, such non-payable sales tax is not recoverable under s. 28 of the STA 2018.

E **[77]** Thus, we find that the respondent's action in raising a BOD for the recovery of sale tax under s. 28 of the STA 2018 is tainted with illegality, since such sale tax cannot be levied and is not payable pursuant to s. 57(a)(ii) of the STA 2018.

F **[78]** Moreover, it is a fundamental principle of law that taxes or duties cannot be imposed on a subject without clear words in any written law, and taxing statutes must be construed in accordance with this principle. In *Comptroller-General Of Inland Revenue, Malaysia v. T* [1969] CLJU 31; [1969] 1 LNS 31; [1970] 2 MLJ 35, Gill FJ said:

G In the absence of a clear intention that tax should be imposed, the respondent is not liable to payment for the sum granted for the abrogation of his contract. **It is an important canon in the construction of revenue Acts that the subject is not to be taxed unless there are clear words in the Act imposing such a tax**.

(emphasis added)

H **[79]** Courts, in determining those "clear words", are to use the purposive approach in interpreting a taxing statute – just as in any other statute. Lord Wilberforce enunciated this principle in *WT Ramsay Ltd v. Inland Revenue Commission* [1982] AC 300, where he said:

I ... I think it opportune to restate some familiar principles and some of the leading decisions so as to show the position we are now in.

> (1) *A subject is only to be taxed upon clear words, not upon "intendment" or upon the "equity" of an Act. Any taxing Act of Parliament is to be construed in accordance with this principle*. What are "clear words" is to be ascertained upon normal principles: these do not confine the courts to literal interpretation. *There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded*: ...
>
> (emphasis added)

[80] The Federal Court in *Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 MLJ 97; [2004] 4 AMR 202 held the principle enunciated by Lord Wilberforce in *WT Ramsay Ltd* applies in consonance with s. 17A of the Interpretation Acts 1948 and 1967 ("the Interpretation Acts") in interpreting taxing statutes. It further held that the principles set out in the advice of the Privy Council delivered by Lord Donovan in *Mangin v. Inland Revenue Commissioner* [1971] AC 739 (the "*Donovan* principles") is the correct approach to be adopted by a court when interpreting a taxing statue. Gopal Sri Ram JCA (as he then was), sitting on the Federal Court panel in *Palm Oil Research And Development Board Malaysia*, summarised the *Donavan* principles as follows:

> First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices ...
>
> Secondly, '... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.' ...
>
> Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.
>
> Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.

[81] His Lordship held that s. 17A of the Interpretation Acts has no impact upon the well-established guidelines applied by courts when interpreting a taxing statute, and that s. 17A and the guidelines in the *Donavan* principles "co-exist harmoniously for they operate in entirely different spheres when aiding a court in the exercise of its interpretive jurisdiction" – that it fits into the third principle of the *Donavan* principles, which is to avoid an interpretation that produces injustice or absurdity.

[82] Applying the purposive approach in interpreting reg. 28(1) of the Free Zones Regulations 1991 and s. 57(a)(ii) of the STA 2018, we find that the said provisions provide for a free tax regime for goods transported or moved between free zones and other bonded/special areas in the principal customs

A area – they both do not require the payment of import duties or taxes for the removal or transportation of goods from a free zone to an LMW and other bonded/special areas licensed under the CA 1967.

[83] More importantly, if Parliament had intended that errors in Form K1 shall give rise to taxes and duties for goods transported from a free zone to an LMW or any other bonded/special areas, it would have expressly provided for it in the relevant Acts or subsidiary legislations.

[84] For these reasons, we agree with learned counsel for Fermpro that any purported error in Form K1 does not oust the provisions in reg. 28 of the Free Zones Regulations 1991 or s. 57(a)(ii) of the STA 2018 to give rise to duties and/or tax for goods transported between special areas.

[85] Hence, we find that it was plainly wrong for the learned High Court Judge to have held that taxes and duties are due and payable on the ethanol moved from the free zone to Molnlycke's LMW because of a purported error in Form K1, when no written law expressly states so.

Decision

[86] Accordingly, we find that the learned judge's decision that there was error in the declaration made in Form K1, and that the respondent can legally levy the duties and taxes for the removal of the ethanol from the free zone to Molnlycke's LMW by reason of the purported error in Form K1 were plainly wrong.

[87] We, therefore, allow Fermpro's appeal against the High Court's order of 25 August 2023. The said High Court order is set aside.

[88] An order of *certiorari* is hereby granted to quash (i) the bills of demand, all dated 15 June 2021, issued by the respondent through the Pengarah Kastam Negeri, Perlis; and (ii) the respondent's decision dated 3 August 2021 affirming the said bills of demand.

[89] Costs in the sum of RM10,000 to be paid by the respondent to Fermpro.